IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, a corporation,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. C. GOERIG and CLYDE PHILP, individuals and co-partners,
Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners,
Defendants and Cross Appellants.

No. 11707

REPLY BRIEF OF CROSS APPELLANTS MACRI

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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JURISDICTION

The jurisdictional point raised by appellee Schaefer has been previously decided by the court and an order entered on March 31, 1948, which order has become and is the law of the case on this appeal. The jurisdictional point raised by Macris (MB 1, 60) has not been answered by Schaefer.

STATEMENT OF THE CASE

In reply to appellee's brief and to conserve space herein, we respectfully indicate that brief as "Schaefer's brief," with citation thereto as "SB" and the page. Similarly, we have indicated the brief of cross appellants Macri as "Macris' brief," with citation thereto as "MB" and the page.

The following astonishing assertion is found at the start of appellee's statement case (SB 4): "It is not claimed by anyone that any portion of Schaefer's work was done improperly, or that he was responsible for any delay in completion." Contrary thereto, two citations will suffice: A special sub-division "unskilled subcontract operations" at MB 71-72; and the statement at MB 14-17.

Similarly, appellee's statement of case concludes (SB 25) with a claim made by M. C. Schaefer at trial that one of Macris' attorneys had stated in a Seattle negotiation conference prior to trial: "You may have

a good legitimate claim against Sam Macri Company." The transcript (Tr. 2023-2027) is a complete refutation of any merit to the quotation, any justification for using it or any trial court sanction thereto.

Between such a start and such a finish for the statement of case appellee's brief employs consistently a method of indirection, evasion and generality. It quotes Schaefer witnesses' interpretations of what Sam Macri and members of his field forces said, without giving the court benefit of the denial of those statements in the record by the latter. It avoids any answer to the presentation at MB 10-12 that a vast majority of the structures were small and shallow box structures without any bank excavation problem involved. It avoids any answer to the contents of the government inspectors' *daily* field reports about Schaefer subcontract derelictions, as shown by Exs. 13a, b, c; 13d-1, incl.; 13m and subnumbers; 13o and subnumbers; and 13n (MB 19). Similarly, it avoids any answer to the government concrete engineer's report shown by Ex. 17a (MB 18).

Appellee's statement of case brushes aside the whole Nelson deposition presentation (MB 18-24) by a single paragraph (SB 23), referring to Nelson as "an assistant director" instead of the engineer actively in charge of 1062 field work as it progressed (MB 20). That paragraph (SB 23) is only one of confession and avoidance of the 14.5% overrun of concrete by Schaefer. It avoids Schaefer's own expert Bufton's statement that an overrun of concrete exceeding 5% would indicate unskilled operations (Tr. 1205, 1207; MB 72). and Hance's undisputed testimony of variable widths of the Schaefer concrete walls (Tr. 1924; MB 72).

Similarly, appellee's statement avoids answering the appellant Continental Casualty Company's discussion of testimony of Schaefer's accountant Hendershott (Br. Con. Cas. 20-22, incorporated at MB 29) and Schaefer's intentional failure to keep costs (Br. Con. Cas. 13-17, incorporated MB 28).

At SB 8 an excerpt from the court's memorandum, regarding job staking by Macris' superintendent Ashley is quoted, notwithstanding the full statement as to Ashley's stakings with citation to the record at Tr. 1876-7, shows that such quoted reference thereto is inapt (MB 66).

We cannot, and do not, concur in the suggested change of the transcript record at p. 1723 from 40 to 400 batches of concrete, as mentioned in the last paragraph on p. 24 of the Schaefer brief to bolster the tabulation discussed at that point.

Appellee's statement of case is so replete with generalities from the record that space, as limited by this court's rules for reply briefs, will not permit any replying thereto in detail. We therefore must respectfully redirect the court's attention to MB 2-29, to appellant Continental Casualty Company's brief at pp. 13-17, 20, and 22, incorporated by reference thereto at MB 27-28, and particularly to the subcontract provisions at MB 5-10, incl., which are not covered in the Schaefer brief.

REPLY TO ARGUMENT

The logical progression, the authoritative basis and the conclusions reached in the legal argument of the cross appellants Macri (MB 36-75) are uninterrupted and unweakened by the points and authorities raised in Schaefer's brief, it is submitted. Reply is made to

those points and authorities under the same Roman numeral heading as that given in the Schaefer brief for the convenience of the court. No reply is made herein to VII, counsel being willing to adopt such reply thereto as may be made by Continental Casualty Company.

I.

Counsel for Schaefer concede as follows (SB 31): That Schaefer elected to treat any breaches by Macris as partial breaches and to continue performance of the subcontract, that there can be no recovery in *quasi* contract *(quantum meruit),* and that the only remedy available to Schaefer for the partial breaches of contract is for damages measured by the increased cost of his performance due to such partial breaches, *except,* counsel assert, Macris' breaches were wilful.

It is not conceded by Macris that they either breached the contract wilfully or otherwise (MB 2). In any event, however, it must be apparent that the point of wilfulness has no materiality on the question of whether or not those breaches were waived by Schaefer. See 12 *Am. Jur. Contracts,* Sec 390, quoted MB Appendix 1; 3 *Williston on Contracts,* Sec 687. The substantial performance doctrine is inapplicable. This doctrine is an equitable doctrine advanced to prevent forfeitures and hardships in situations where a claimant has been guilty of partial contractual breaches and would be precluded from recovering the contract price under strict law requiring that a contract must be fully performed, 12 *Am. Jur., Contract,* Sec. 343; *Patrick v. Bonthius,* 13 W. (2) 210, 124 P. (2) 550. Under that doctrine, the conduct of the party charged with contractual breach is material. But, in

the instant case, it is the conduct of Schaefer which is material, not the conduct of Macris or the wilfulness or involuntary nature of their asserted breaches. Schaefer could and did, as his counsel have conceded, elect to treat any breaches by Macris as partial breaches, whether or not such breaches are said to be wilful. It is noteworthy, but understandable, that counsel have cited not one case supporting their contention that the so-called wilfulness of Macris' breaches prevented such an election and waiver of the total nature thereof. One suspects that counsel for Schaefer dusted off this well-known doctrine of substantial performance simply because the term "wilful breach" is frequently used with it.

Manifestly, there is no unjust enrichment situation present (SB 34), for Schaefer's entire performance was for an agreed exchange — the contract price. Schaefer may not have made an advantageous contract, but by his own election he elected to keep the contract in effect, and his only available action is for damages. *U. S. v. Wyckoff Pipe & C. Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938.

The cases cited by Schaefer (SB 27-30) are not apposite, as has been pointed out (MB 42-43), because they involve total breach situations where there has been no completion of the contractual performance and waiver of such total breaches, where the non-breaching party has exercised his election to rescind the contract and sue on *quantum meruit,* rather than electing to continue performance as Schaefer did in the instant case. The case of *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. (2) 1034, (SB 30), in no sense expresses a contrary view.

Schaefer's contention as to the unliquidated character of Macris' performance (SB 35), is without merit. After completion of the performance of the contract by Schaefer the only consideration due from Macris was the payment of the balance of the contract price, a liquidated debt. The proper meaning and application of *Restatement of Contracts,* Sec. 350, is made clear by consideration of the comments and illustrations to that section and the fact situations of such cases as *Graves v. Smith,* 7 Wash. 14; *Stark v. Magnuson,* 2 N. W. (Minn.) (2) 814. The case of *Nelson v. City of Seattle, supra* (SB 36), is not in point.

The discussion (SB 36-38), concerning Schaefer's right to recover overhead and profit in *quantum meruit,* is irrelevant because he has no right whatsoever to recover in *quantum meruit* for work done in performance of the subcontract. *Nelson v. City of Seattle,* 180 Wash. 1, at page 9, 38 P. (2) 1034. As heretofore stated, Schaefer has conceded this proposition to be sound (SB 31). Under the cases of *Queen City Const. Co. v. Seattle,* 3 W. (2) 6, 99 P. (2) 407, and *Harris v. Morgensen,* 131 Wash. Dec. 198 (July 22, 1948), work done in the performance of a contractual obligation will not support even an express promise.

II.

The trial court expressly found there was no modification of the written subcontract (MB 24). Schaefer contends he fully performed it (SB 4). Consequently, the doctrine of promissory estoppel as embodied in *Sec. 90 of Restatement of Law of Contracts* has no possible application to this case. This is true because

there would be no detriment sustained by Schaefer due to reliance upon any otherwise unenforcible promise by Macris. Rather, Schaefer's actions were plainly induced by the terms and conditions of the valid and binding subcontract which was in existence at all times during the performance of specifications 1062 and the terms of which were and are binding upon the parties. For any detriment or damage sustained by Schaefer because of any of the conduct of the Macris complained of, Schaefer is given the right to recover damages arising out of such breaches, provided he can with reasonable certainty prove the same (MB 50). Schaefer's performance of that which he was contractually bound to do cannot create an estoppel situation against the Macris. *Queen City Const. Co. v. Seattle,* 3 W. (2) 6, 99 P. (2) 407, and *Harris v. Morgensen,* 131 Wash. Dec. 198.

With respect to the additional costs and expenses, if any, made necessary by the Macris and referred to by appellee (SB 44), it is to an extent immaterial whether recovery for such items is considered under the heading of promissory estoppel, implied contract as discussed in the following section of appellee's brief, or, more accurately, as damages for a partial breach of the subcontract. The situation would be the same, that is, Schaefer has: (1) failed to comply with the subcontract terms for such additional recovery (MB 7-10, 15, 56, 57); (2) failed to present a bill or statement for such extra or additional recovery (MB 7-10, 63); and (3) failed entirely to prove at trial the amount of such additional or extra cost of performance or the reasonable value thereof (MB 52, 53).

Along with *Sec. 90 of Restatement of Law of Contracts,* Schaefer cites (SB 40-43) several cases wherein the doctrine of promissory estoppel has been applied by the court to prevent hardships or injustice, which is the only proper application for the doctrine. 1 *Williston on Contracts,* Sec. 139. Where the normal contractual remedies are available to a party, the doctrine of promissory estoppel has no place. 19 *Am. Jur., Contracts,* Sec. 53, 148. That is why, as in the instant case, an oral promise or assurance of performance of a prior written contract, such as Schaefer asserts was made by Macris, cannot raise the doctrine. Failure to carry out such assurances always constitutes a breach of the prior written agreement in and to the same extent for which all of the normal remedies for breach of contract are available. By the same token, there is no injustice to Schaefer here for he is admittedly entitled to recover his damages under the normal rules of damages if he proves a breach of the subcontract, and proves his damages. How, in good conscience, can Mr. Schaefer insist that there is an injustice unless he recovers more than what he agreed to accept for his performance plus any additional cost to him in rendering his performance?

The contentions by Schaefer at SB 44-45 have already been answered. The district court held that there was no such binding oral promise or promises as alluded to (Tr. 2214-15); the doctrine of promissory estoppel has no application, as just stated; and Macris' obligation remaining due under the subcontract after performance by Schaefer was a liquidated one. *Restatement of Contracts, Sec 350,* Comment (b) and illustrations.

III.

It is submitted for the court's consideration, that in the face of the written subcontract between Macris and Schaefer, upon which Schaefer's entire performance was predicated, no such implied in fact agreement as that contended for by Schaefer is possible (SB 47).

Counsel for Schaefer cannot do less than admit that every dollar spent by Schaefer for labor and materials on job 1062 was spent in the performance of or in order to perform Schaefer's subcontract with Macris. In fact, it is so contended by them:

> " * * * Here, no change was made by the owner or principal contractor in either the plans or specifications, of the sort contemplated by the first paragraph of Section 3 of Article Three. Instead, Macri Company failed to perform the obligations imposed upon them by the subcontract, and the extra work became necessary in order that Schaefer might carry out his own obligations." (SB 56)
>
> " * * * Everything done by him (Schaefer) was 'work provided for in said contract,' when those words are given their natural, normal meanings. When his men fine graded an excavation, carried forms back to the yard for repairs, or did anything else which Macri Company imposed upon them, they performed 'work provided for in said contract' as surely as when they poured concrete. Everything done by him contributed to the completion of the project. He completed the job in the only way it could have been done * * *" (SB 90)

An examination of the nature of Schaefer's own complaints concerning Macris reveals even more clearly that these complaints relate only to matters causing

delay in Schaefer's performance and/or increased cost of performance, not to the imposition upon him of additional or extra work outside of the scope of the subcontract. Schaefer has made a host of complaints of his men wasting many hours waiting until excavations were completed and fine graded by Macris' crew; of excavations not made in proper sequence; of not having lumber on hand; of his carpenters having to shovel now and then in order to place forms; of forms being damaged in removal because of improper excavation. To the same effect are the asserted assurances and urgings of Macris upon which he claims to have relied. Macris, he asserts, promised "to do better" (SB 57); "You're not going to have to wait for anything more * * *" (SB 56); etc.

Under such a fact situation as Schaefer has himself advanced, the authorities cited by him (SB 47-51) have no application. The subcontract required certain things of Schaefer, the performance of which was made more onerous, he asserts, because of a variety of failures on the part of the Macris which delayed him; but it can be fairly said, nevertheless, that his entire performance was for the accomplishment of that which he was contractually bound to do. There is no "extra work" involved in such things as waiting and wasting time while Macris' own crew made corrections, in delays for lack of lumber, when Schaefer supplied not one extra board, in additional time required to place forms in an excavation because banks were not sloped one to one. Such complaints constitute a major portion of Schaefer's asserted loss. On these Schaefer seeks to pyramid an overhead and profit allowance. He may have been

damaged by Macris in the manner asserted but he did not, as elsewhere in his brief he admits (SB 90), perform "any extra work" within the meaning of the cases he has cited (SB 48, 51), in not one of which was there an existing express contract being performed. To reiterate, Schaefer's action, if any, is for such damages as were occasioned to him by the asserted partial breaches of the subcontract.

Adverting again to fundamental concepts of contract law, the only implied agreement which can be correctly said to have existed between Schaefer and Macris, is an implied term of the subcontract relating to the secondary rights of contracting parties. Reference is to the implied promise to pay for such damages as were within the contemplation of the parties and reasonably and necessarily flow from any breach or breaches of the contract. It might be said that there was such an implied promise on the part of Macris just as the same might be said of Schaefer. It will be observed that under this implied term, damages payable are *"actual"* damages (MB 53) and do not include the right to top-off with a generous overhead charge and a handsome profit item, both based upon an arbitrary percentage of total performance costs. Damages are compensatory in contract law, and profits are to be made by the promisee, if at all, out of the agreed contract price. Thus, Schaefer here has no right to recover profit and overhead as an item of damage.

Counsel for Schaefer cannot successfully reconcile the subcontract with an implied in fact agreement, as they attempt to do (SB 52); for, among other reasons, the work done by Schaefer was in the performance

of the subcontract as heretofore discussed, because as Schaefer contends, the "extra work" was necessary in order that he might carry out his own obligations (SB 56) and because the parties did not modify that subcontract (Tr. 2214-15).

The cases of *Western Asphalt Co. v. Valle,* 25 W. (2) 428, 171 P. (2) 159, and *Chandler v. Washington Toll Bridge Authority,* 17 W. (2) 591, 137 P. (2) 97, cited MB 44, and alluded to by Schaefer (SB 54-55), are authoritative in precisely the light in which they were cited; and so are the cases cited by Macris between MB 44-63, particularly the case of *U. S. v. Wyckoff Pipe & C. Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938, which is stated to be and which is controlling of the instant case. The only reference made by counsel for Schaefer to these cases is "The remaining cases are equally inappropriate and do not merit discussion" (SB 55). The court's attention is respectfully re-directed to the *Wyckoff* case and to the other cases of the United States Supreme Court cited in this portion of Macris' brief (MB 44-63).

It is the gist of Schaefer's contention on page 56 that he performed no extra work, outside the scope of his subcontract, but rather only to carry out his own subcontract. The quintessence of his complaint is delay. Art. III, Sec. 5 of the subcontract reads as follows:

> "If the work hereunder shall be delayed by any act, neglect or default of the owner or of the principal contractor, or of any other contractor employed by the Owner or the Principal Contractor upon the entire work, * * * through no fault of the Subcontractor then the time herein fixed for completion of the work shall be ex-

> tended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed unless the Subcontractor shall give the Principal Contractor notice, in writing, within five days after the occurence of any such act, omission or event, specifying the fact and cause of the delay. * * * "

Under the cases of the U. S. Supreme Court (MB 56), Macris are not under the contract obligated to pay damages to Schaefer because of delay. The cases involving waiver of written provisions with respect to extra work outside the scope of the contract are not apposite. The urgings by Macris to get Schaefer to perform his subcontract do not, properly considered, amount to any waiver by Macris of Art. III, Sec. 5 of the subcontract, nor create any estoppel situation. Schaefer can only say that, under these urgings, he continued the performance of his subcontract. But delayed performance is not a compensable element of damage under the provisions of the subcontract. Otherwise stated, it is conclusively made, by the terms of the subcontract, an item of damages not within the contemplation of the parties at the time the contract was entered into. The rule of *Hadley v. Baxendale,* 9 Ex. 341, is applicable.

IV.

There is no dispute with the deference accorded the findings of the District Courts in law actions under Rule 52 (a). The point made by appellants case is unanswerable contrary to the court's finding that Macris breached the subcontract in the manner and extent asserted by Schaefer; that the court's finding is not supported by the substantial evidence in

the case; that the court's finding is contrary to the clear weight of the evidence and induced, apparently, by an erroneous view of the law. *Fleming v. Palmer,* 123 F. (2) 749; *Sbicca-Del Mac Inc. v. Milius Shoe Co.,* 145 F. (2) 389.

V.

Studied attempt to focus this court's attention on the compilation by Schaefer's accountant Hendershott (Ex. 63) and on the Darcy chart of his ideas of exhausted time (Ex. 51), to the exclusion of considering merits from the testimony of those actually working on the job, permeates subdivision V at SB 61-75.

An example is the statement on SB 61 that "counsel for Macri have not attacked the accuracy" of the Hendershott compilation, "nor have they contended that it does not truly show Schaefer's actual costs and expenses." Our specifications of error No. 3 (MB 29-30) and Nos. 9, 10 and 15 (MB 32-34) refute that; also MB 37-39 Nos. 3 and 7 do likewise; semble, MB 53-54.

Similarly, it is stated at SB 62 that it was "Schaefer's practice to bill on that basis," i. e., cost plus overhead and profit. Schaefer, however, denied that at trial (Br. Con. Cas. 14-15; Tr. 2155). Inconsistently also, it is stated at SB 64: " * * * it is conceded that Schaefer did not keep a separate account of his extra costs."

The Hendershott tabulation from which counsel devise the compilation, at SB 62, and the Darcy chart were pretrial preparations, predicated upon expectation that an oral substitute contract would be sustained by the court. That was not done. The court

found there was no "meeting of the minds" that Schaefer was to be paid the "reasonable value of his costs" (quoted at MB 24 from Tr. 2214-15). The proffered tabulation under subheading 1 at SB 62 therefore falls because of its own lack of foundation.

On the proffered proposition of claimed estoppel asserted at SB 63-74, the one vital point for justification is missed and is wholly absent. It was legally incumbent upon Schaefer to keep his extra costs—under the subcontract terms (Ex. 5, Sec. 3; MB 9) if that subcontract legally controls; or, under oral substitute contract, if that had been held to have been substituted for the subcontract, which it was not (MB 24).

Schaefer, not Macris, failed to keep account of alleged extra costs. Therefore, since it is expressly conceded (SB 64) that "Schaefer did not keep a separate account of his extra costs", he cannot qualify for support of either of the following two U. S. cases quoted at SB 72-74.

The case of *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515, 66 Sup. Ct. 1187, held that the failure of an employer to keep his own accurate accounts and records justified recovery against him by an employee on an estimated basis, because the amount of damages could not be determined with exactness.

The other case of *Bigelow v. RKO Radio Pictures, Inc.,* 327 U. S. 251, 90 L. Ed. 652, 66 Sup. Ct. 574, an anti-trust suit on conspiracy to control release of motion pictures, allowed recovery of damages as to one affected plaintiff independent theater by comparison of that plaintiff's earnings before and after

the exertion of the conspiracy. It held the conspiracy was the cause of the plaintiff's inability to compute exact costs and that the plaintiff should not, therefore, be barred from recovery by a defendant having created that disability. But counsel here concedes (SB 64) that "Schaefer did not keep a separate account of his extra costs." Schaefer, not Macri, records were the deficient source for a correct claim.

The claimed tabular demonstration for speedy work at SB 68 lacks record confirmation. It covers a period when the government was insisting that Schaefer quit lagging behind and perform his subcontracted work. Ex. 39, dated September 18, 1944, is a government communication to Macri, with a copy to Schaefer, and Ex. 37, dated January 25, 1945, is a like communication to Schaefer (MB 18). During the period of February and March 1945 the government was invoking penalties at the rate of $25 per day as liquidated damages for delayed performance (MB 60).

Such proffered tabulation also avoids the following record disclosures: (1) For form setting, an uncontroverted national lumber shortage, despite which over 120,000 bd. feet of lumber were furnished — Schaefer conceded 150,000 bd. feet—with not to exceed 70,000 bd. feet required for forms (MB 70; Tr. 1471, 1418, 1796, 1892); (2) pouring concrete, 665 sacks of cement delivered to Schaefer in April 1944, with an adequate Jaeger mixer available at Portland and with forms set, but no concrete placed until the end of July 1944 (MB 70; Tr. 2143, 1715, 222, 392) —in the Schaefer brief counsel concede Schaefer took his crew, except two laborers, off the job for May through July 1944 (SB 21; MB 15-16)—; and 14.5%

of overrun of concrete (MB 72) which Schaefer's witness Bufton said would indicate unskilled subcontract operations (MB 72; Tr. 1207); and (3) stripping forms, could be no criterion, because until the forms were filled with concrete and cured they could not be stripped from the concrete structures.

Similarly, the proffered percentage table at SB 69, by reference to the Darcy chart (instead of original records) avoids the fact that, by reference to the other proffered percentage tabulation at SB 68, it was speed-up pressured work in a short period of time, after Schaefer had wasted the seasonal construction period from April through July 1944. It is purely an attempt to breath into Bufton's estimate of cost per cubic yard of concrete a job performance justification, which was not in existence. It overlooks two salient and vital features of Bufton's testimony on cross examination: (1) It is always "disastrous" to carry a construction job through the winter (MB 17; Tr. 1176); and (2) Bufton's statement " I certainly would have a shovel on the job while setting forms" (MB 67; Tr. 1218).

The two tabulations at SB 69-71 are mere reiterations of the figures in the Hendershott tabulation, slightly re-arranged by counsel; and, like the compilation at SB 62, also fall, under the law as presented in points 1, 2, 3 and 4 of our opening argument at MB 36-37, for lack of foundation.

We, therefore, respectfully submit, in view of the foregoing and of the inapplicability of either of the U. S. cases above discussed, that the Schaefer brief under its subdivision V (SB 61-75) wholly fails to answer the merits presented in the Macri brief at MB 59-74 and particularly at 60-74.

VI.

The question of the effect of the Washington statute, *Rem. Rev. Stat.,* Sec. 9980 (MB 59), is squarely before the court. The trial amendment allowed by the trial court and alluded to by counsel (SB 78) fulfills the requirements of Rule 9 (a) of the Rules of Civil Procedure.

CONCLUSION

In conclusion, cross appellants Macri respectfully submit that the arguments and authorities set forth in the opening brief of these cross appellants have not been answered by appellee Schaefer, that those arguments and authorities establish the judgment of the district court in favor of the use plaintiff, M. C. Schaefer, is opposed to the law applicable to this case, and that the finding of the District Court that Macris had breached the subcontract is clearly erroneous. The judgment of the district court should, therefore, be reversed and the action dismissed.

Respectfully submitted,

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